UNITED STATES OF AMERICA

DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 19th day of January, 1996

SECOND LOS ANGELES INTERNATIONAL AIRPORT RATES PROCEEDING	:	Docket OST-95-474

ORDER

In June 1995 the respondents, the City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners (collectively the City), adopted new landing fees at Los Angeles International Airport (LAX) for the City's fiscal year ending June 30, 1996. The Air Transport Association and fifty-nine airlines (the Complainants) filed a complaint asking us to determine the reasonableness of these increased fees under 49 U.S.C. 47129. About half of the Complainants are foreign airlines.

We found that the complaint presented a significant dispute and determined after a hearing before an administrative law judge that the increased LAX fees were unreasonable in part. Order 95-12-33 (December 22, 1995). We further determined that the City must make refunds to the Complainants -- both U.S. airlines and foreign airlines -- of the excessive fee amounts paid by them. The refunds currently due equal $0.37 per thousand pounds landed weight. Order 95-12-33 at 52-53.

On January 5, 1996, the City filed two motions, one seeking reconsideration and correction of our final decision in order to reduce a portion of the refund amount and the other requesting a limited stay of our refund order insofar as it applies to foreign airlines.[1] This order addresses only the City's stay request.

[1] The landing fees paid by the cargo airlines at LAX reflect those carriers' share of the costs of the airfield, but cargo airlines, unlike passenger airlines, are not charged for the cost of the apron. The refund amount due under our order for the cargo airlines will be less than $0.37 per thousand pounds landed weight. To simplify the discussion in this order, we will analyze the issues using the refund amounts due the passenger airlines. In addition to the amounts currently due, the City could become obligated at the end of its fiscal year to refund its charge for noise mitigation expenses if certain conditions do not occur. Order 95-12-33 at 53.

Our decision that an airport charging unreasonable fees must make refunds to the airlines filing a complaint under 49 U.S.C. 47129 and that foreign airline complainants are as entitled to refunds as U.S. airline complainants is the same decision we made in our earlier proceeding involving the reasonableness of the LAX landing fees charged from July 1993 through June 1995. Los Angeles International Airport Rates Proceeding (First LAX Case), Order 95-6-36 (June 30, 1995).

The refund required by our final order in this proceeding will be paid in two different ways. The largest part of the amount due, originally set at $0.29 per thousand pounds landed weight, represents the amount of the fee created by the City's improper use in the fee calculation of the fair market value of the airfield and apron land rather than the land's historic cost. Order 95-12-33 at 53. The airlines and the City have agreed on an escrow arrangement for that portion of the fees, so we did not require an immediate refund of the fee amount representing the excessive land valuation charge. Order 95-12-33, ordering paragraph 10; Orders 95-12-34 (December 22, 1995) and 95-9-8 (September 8, 1995). The funds held in the escrow account will be paid to the airlines if the courts affirm our decision in the First LAX Case that the City may not value the airfield and apron land on the basis of fair market value.

The remaining refund amount -- $0.09 per thousand pounds landed weight -- reflects the City's allocation of an excessive share of the costs of fire and police protection to the landing fee rate base, its improper inclusion of a debt service coverage charge, and its admitted errors in calculating the fees. That amount must either be refunded to the airline complainants in cash or by credit against future fee payments. Order 95-12-33, ordering paragraph 9. Under the statutory scheme, such refunds must be arranged within thirty days of the date of our final decision on a fee's reasonableness. Order 95-7-33 (July 25, 1995) at 3.

The City is asking us to stay its obligation to make refunds to the foreign airlines. The City contends that it will seek judicial review of our determination that foreign airlines are entitled to use the procedures established by 49 U.S.C. 47129 and that it should not have to pay refunds to the foreign airlines when it has no obligation to do so (the City, however, apparently does not plan to challenge our determination that the fees were too high by $0.09). The Complainants object to the City's stay request on the grounds that it would harm the foreign airlines and would violate the United States' obligations under many international agreements to ensure that foreign airlines are not subjected to discrimination.

We have decided to deny the City's stay request.

Background

In the First LAX Case, Order 95-6-36 (June 30, 1995), we determined that the LAX landing fees adopted by the City in 1993 were unreasonable insofar as those fees included a rental cost for the airfield and apron land based on the land's estimated fair market value rather than the land's historic cost. As a result, we directed the City to refund the amount of the fee representing the excessive land valuation to the sixteen airlines that filed the original complaint against the fees under 49 U.S.C. 47129. After a careful analysis of the issue we concluded that the foreign airlines included among those sixteen complainants were entitled to refunds under the statute. Order 95-6-36 at 53-56.

The City and the airline parties in our proceeding have sought judicial review of our decision. City of Los Angeles et al. v. the Department of Transportation et al., D.C. Cir. Nos. 95-1344 et al. (filed July 7, 1995). The City plans to challenge several of our determinations, including our findings that the fees were unreasonable and that the foreign airline complainants were entitled to refunds under 49 U.S.C. 47129. Respondents' Answer to Complaint at 3-4; Respondents' Motion for Limited Stay at 6.

In that proceeding, rather than pay the refunds as required by our decision, the City asked us to stay its refund obligation pending judicial review. Although the complainant airlines objected to the stay request, we stayed the City's refund obligation pending judicial review. Order 95-7-33 at 10-12. While we found that the City had not satisfied the usual requirements for obtaining a stay pending review, we nonetheless determined that a stay would be appropriate, in part because of our authority under the Administrative Procedure Act to postpone agency action and in part because the City would submit a bond protecting the airlines' ability to obtain refunds if the courts affirm our decision on review. We also noted that the complainant airlines had not alleged that they would be harmed if the refund payments were delayed. Order 95-7-33 at 10-11.

The City's Stay Request

The First LAX Case involved the landing fees in effect from July 1993 through June 1995. This proceeding involves the increased fees in effect for the City's current fiscal year, which ends June 30, 1996. As indicated, we found that the fees were unreasonably high in several respects and ordered the City to make refunds. As noted above, the amount of the refund currently due the Complainants on all issues other than the land valuation issue will be $0.09 per thousand pounds landed weight.

The City states that it intends to seek judicial review of some of the findings in Order 95-12-33. The City implies that it is not planning to contest our decision that the fees were too high (except on the land valuation issue), and it represents that it will refund the $0.09 per thousand pounds landed weight amount to the U.S. airlines included among the Complainants and will reduce its landing fee

prospectively as required by our decision. Respondents' Motion for Limited Stay at 1, n. 1.

Notwithstanding its willingness to refund the excess fees paid by U.S. airlines, the City is asking us to stay our order requiring it to make the refund of $0.09 per thousand pounds landed weight to the foreign airlines included among the Complainants. In its motion the City alleges that it intends to seek review of our determination that foreign airlines are entitled to obtain refunds under 49 U.S.C. 47129, the statute governing the procedures in this case. According to the City, there is at least a substantial question as to the eligibility of any foreign airline to obtain relief under 49 U.S.C. 47129.

The City claims, moreover, that the stay would not harm the foreign airlines, since the City would submit a bond protecting their right to obtain refunds if the courts determine that foreign airlines may obtain refunds under 49 U.S.C. 47129. In that regard the City cites our statements in the First LAX Case that a stay of the City's refund obligation would not harm the airlines. The City further asserts that a stay would be consistent with Rule 62(d) of the Federal Rules of Civil Procedure, which automatically entitles a defendant to obtain a stay pending appeal of an order requiring payment of a money judgment if the defendant submits an appropriate bond.

Finally, the City alleges that it would be harmed if no stay were granted. The City assertedly might be unable to recover the refund payments made to foreign airlines if the courts agree with the City's position that foreign airlines are not entitled to refunds under 49 U.S.C. 47129, since the foreign airlines' assets are mainly located in foreign countries. According to the City, if its position is vindicated by the courts, "it could have irrevocably forfeited millions of dollars that were improperly refunded or be forced to engage in extensive litigation to procure repayment." Respondents' Motion for Limited Stay at 5.

The City asked that we rule on its stay request by January 18, so that it can either comply with our decision by January 22, 1996, or seek appropriate judicial relief. Respondents' Motion for Limited Stay at 7-8.

The Complainants' Response

On the ground that the United States is obligated to ensure that foreign airlines are not discriminated against, the Complainants oppose the City's stay request. They claim that the requested stay would allow the City to charge foreign airlines higher landing fees than it charges U.S. airlines and that such discrimination would violate United States law and international law. The Complainants allege that the stay would harm the foreign airline complainants, since those airlines, unlike the U.S. airline complainants, would be unable to use the refund funds for a substantial period of time, perhaps several years. Complainants' Opposition at 7.

The Complainants contend that the procedural rule cited by the City -- Rule 62(d) of the Federal Rules of Civil Procedure -- is irrelevant. Our proceedings are not controlled by that rule, and instead we may grant a stay only if we find in our discretion that "justice so requires." According to the Complainants, justice requires the denial of the City's stay request.

First, the Complainants state that numerous international agreements require the United States to give foreign airlines the same rights as U.S. airlines, as we have stated in this case and the First LAX Case. The Complainants quote our finding in the First LAX Case that discrimination would result if foreign airlines were unable to obtain refunds of excessive fees as easily as U.S. airlines. Complainants' Opposition at 2, 3, quoting Order 95-6-36 at 54-55. The Complainants point out that the City neither argues that a stay would be consistent with the United States' international obligations nor that a stay would not constitute discrimination against foreign airlines.

The Complainants further assert that a stay would harm the foreign airline complainants, since it would deny them access to refunds for a significant period of time. They note that the Court of Appeals has not yet set a briefing schedule in the proceeding on review of our decision in the First LAX Case, the proceeding where the Court would initially review our determination that foreign airlines have the same procedural rights under 49 U.S.C. 47129 as U.S. airlines. Complainants' Opposition at 3.

The Complainants also contend that the City has not satisfied any of the traditional requirements for obtaining a stay pending review. Among other things, they assert that the type of economic loss alleged by the City cannot constitute irreparable harm warranting a stay. Complainants' Opposition at 5.

Our Decision

We will deny the City's request for a stay. First, the City's apparent position is fundamentally unfair. The City has implicitly stated that it will not contest our decision that the landing fees were too high by $0.09 per thousand pounds landed weight due to the City's improper allocation of police and fire protection charges to the airlines and its unreasonable inclusion of a debt service coverage charge and charges that the City has admitted were erroneous. The City thus represents that it will make refunds to the U.S. airline complainants and will reduce its fees prospectively as required by our order. Thus, as a legal matter, the City will accept our conclusion that its fees were too high and were unjustified by the costs properly chargeable to the airlines.

Notwithstanding the City's likely acceptance of our conclusion that the LAX fees were unreasonably high, the City claims that it can keep the excessive fees paid by

the foreign airlines merely because those airlines are allegedly ineligible for refunds under 49 U.S.C. 47129. As we have found, those airlines are entitled to receive refunds under that statute. But even if they were not, it would be inequitable for an airport operator to accept a decision that its fees were too high and then insist that it is entitled to keep the unlawful payments.[2]

Aside from the basic unfairness of the City's position, the City has failed to show that our refund order should be stayed. As we stated in the First LAX Case, we have the authority to stay an order under the Administrative Procedure Act, 5 U.S.C. 705. That statute authorizes an agency to stay a decision "[w]here an agency finds that justice so requires . . . ." Order 95-7-33 at 10. We find that granting the City's stay request, far from being required by justice, would instead create an injustice.

The foreign airline complainants are entitled to nondiscriminatory treatment on matters such as airport fees under numerous agreements between the United States and other countries. As we explained in the First LAX Case, the foreign airlines' rights would be violated if those airlines were unable to obtain refunds as easily as U.S. airlines. Order 95-6-36 at 54-55. Granting the stay sought by the City would accordingly constitute the type of discrimination barred by the United States' agreements with many other countries. The City has made no effort to argue the contrary.[3]

Moreover, notwithstanding the City's offer of a bond and its obligation to include interest in the payments that would be required if the courts affirm our decisions that foreign airlines are entitled to refunds under 49 U.S.C. 47129, we agree with the Complainants that the foreign airlines would be inconvenienced by a stay. Pending the courts' decision those airlines, unlike the U.S. airline complainants, would not have access to the refund amounts.

Given the overriding importance of our obligation to ensure non-discriminatory treatment for foreign airlines, we find unpersuasive the City's reliance on Rule 62(d)

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[2] The City's argument in support of a stay implicitly assumes that 49 U.S.C. 47129 would be the only basis for an award of refunds when we find that an airport fee is unreasonable. That assumption may well be incorrect. As we explained in the First LAX Case, the other statutes authorizing us to investigate whether an airport fee is reasonable may also authorize us to award refunds, although that issue has not been resolved. Order 95-6-36 at 52. The airlines might also have the right to file suit against the City if it fails to make refunds. Id. at 52, n. 35.

[3] Our obligation to ensure non-discriminatory treatment for foreign airlines is, of course, matched by the obligation of foreign governments to ensure that U.S. airlines are not subjected to discrimination in foreign countries. We have vigorously prosecuted U.S. airline rights to non-discriminatory treatment in cases where discrimination by a foreign government or firm appeared to occu See, e.g., American Airlines v. Iberia, Lineas Aereas de Españ Order 90-6-21 (June 8, 1990). The same agreements that give U.S. airlines the right to non-discriminatory treatment require us to ensure that foreign airlines are not subjected to discrimination in the United States.

of the Federal Rules of Civil Procedure. Rule 62(d) entitles a defendant to a stay of a judgment requiring the payment of money pending appeal if the defendant posts a bond. That rule is not binding upon us. We decline to follow that analogy in this case since, as shown, the stay requested by the City would violate the United States' international obligations.

The City has also failed to satisfy any of the factors traditionally required in order to obtain a stay of one of our decisions. First, the City has failed to show that it is likely to prevail on the merits. While the City contends that a stay is appropriate because its intended challenge to our conclusion that foreign airlines have the same rights under 49 U.S.C. 47129 as U.S. airlines is substantial, we cannot agree. Although we once assumed that the statute did not authorize foreign airlines to file complaints under its provisions, when we examined the question more closely we concluded that the statute must be read to give foreign airlines the same rights and remedies as U.S. airlines. Order 95-6-36 at 53-56. The City states that it disagrees with that conclusion, but it has not tried in this proceeding to show that our conclusion was erroneous. Indeed, as we noted in our final decision, the City's challenge in this proceeding to the foreign airlines' right to refunds was based on the mistaken claim that we had based their refund right on our procedural rules rather than the statute. Order 95-12-33 at 52, n. 31. In any event, the City has not shown that it is likely to succeed on the merits on a challenge to our interpretation of the statute.

The City's stay request also does not meet the traditional standards for granting requests for a stay of an agency decision pending review. In particular, the City has failed to show that it would suffer irreparable harm without a stay. The City's claim of harm is based on the allegation that it would have great difficulty in recovering the refunds paid foreign airlines if the courts ultimately determine that we could not order the City under 49 U.S.C. to pay refunds to the foreign airlines. The City alleges that it might have difficulty recovering the refunds because the assets of the foreign airlines are largely located in foreign countries and that the City might be unable to enforce its claims against those airlines. Respondents' Motion for Limited Stay at 5.

As pointed out by the Complainants, the type of inconvenience pictured by the City cannot constitute irreparable harm. Complainants' Opposition at 6. The City's alleged right to sue the foreign airlines to recover any unjustified refund payments is sufficient to eliminate the City's claim of injury despite the theoretical possibility that recovering refunds from some foreign airlines might be difficult.

In any event, the City would be unlikely to encounter much trouble in recovering almost all of the refunds paid foreign airlines. Most of the foreign airlines entitled to refunds in this proceeding are large well-established airlines -- for example, KLM, Lufthansa, Qantas, Singapore Airlines, and Swissair -- that are likely to continue serving Los Angeles and other U.S. cities for many years. Presumably the great majority of the refund amounts at issue are due these carriers and could be collected

through normal judicial procedures. While a few of the foreign complainants are relatively small airlines, the refunds due them must account for a small portion of the total amount due the foreign airlines. Certainly the City has produced no evidence demonstrating that the foreign airlines would be unlikely to repay any improper refunds.

We further note that the amount of money at issue is not substantial in comparison to the overall finances of the City's Department of Airports. The amount by which the fees are too high for the City's entire fiscal year (the year ends on June 30, 1996) is less than $6 million, Order 95-12-33 at 52-53, but the refunds would be due only for the period until the City corrects the fee, a period less than seven months in length. The City's total refund obligation to the Complainants (excluding the land valuation issue and the potential refund for the noise mitigation charge) will therefore be about $3 million. While the City has given us no estimate of the proportion of the refunds due foreign rather than U.S. airlines, we must believe that the large majority of the refunds will be paid to U.S. airlines.[4] The City, moreover, is willing to pay refunds to U.S. carriers. Thus only a small fraction of the $3 million amount is at stake if refunds are required for foreign airlines. And the airport has been quite profitable overall, Order 95-6-36 at 22-23, so that the City's possible inability to recover all of the refund payments would have no impact on its financial stability.

Another important consideration in reviewing a stay request is whether the stay would injure the public interest. Here a stay would clearly injure the public interest, since it would cause the United States to violate its obligations under many international agreements.

In addition, the stay sought by the City would harm the foreign airlines, since they would have no access to the refund amounts for a significant period of time.

We recognize, of course, that we stayed the City's refund obligation in the First LAX Case, a decision that the City insists should be followed here. In that case, however, we specifically noted that the airlines had not claimed that a stay would harm them. Order 95-7-33 at 11. The stay in that case applied to both U.S. and foreign airlines, so it did not violate any international obligations of the United States. And in that case the City was seeking review of our underlying finding that the landing fees were too high -- here, in contrast, the City is presumably accepting our finding that the fee was unreasonable.

Finally, we must address one point made by the City with respect to its fee-setting responsibilities. While the City states that it plans to revise the fees charged both

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[4] The City's failure to state the amount of money at issue further suggests that the amount is relatively small.

U.S. and foreign airlines for the rest of its fiscal year so that all airlines pay fees consistent with our final decision in this proceeding, the City suggests that it has no legal obligation to correct the fees paid by foreign airlines and that, if it wished, it could continue charging them the fees originally adopted in June 1995. Respondents' Motion for Limited Stay at 1, n. 1. Any such action by the City would plainly violate its agreement as a grant recipient under the Airports and Airways Improvement Act that it will not engage in discrimination against any airport user. 49 U.S.C. 47107(a)(1), (2). See also City and County of San Francisco v. FAA, 942 F.2d 1391 (9th Cir. 1991). Any different treatment of U.S. and foreign airlines would, of course, also violate the United States' international agreements.[5]

ACCORDINGLY, we deny the Respondents' Motion for a Limited Stay of the Secretary's Final Decision.

By:

PATRICK V. MURPHY
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

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[5] For the same reason, the City must reduce the fees charged airlines that did not join in this proceeding, since they, too, are entitled to pay only the same fees charged the Complainants. See also Order 95-6-36 at 45.